United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1064

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To be Submitted

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UNITED STATES COURT OF APPEALS
For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

NORMAN BURTON,

Appellant.

On Appeal From The United States District Court For The Southern District Of New York

APPELLANT'S BRIEF ON APPEAL

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- -X

UNITED STATES OF AMERICA,

-against-

NORMAN BURTON,

Defendant-Appellant.

- -X

APPELLANT'S BRIEF ON APPEAL

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PRELIMINARY STATEMENT

The indictment number is 74 CR 737. The names of the parties are - The United States of America -v- Norman Burton, a/k/a "Big Time" and John Doe "Ron".

The action was commenced by an indictment charging the defendant-appellant with unlawfully, intentionally and knowingly distributing and possessing with intent to distribute two Schedule II narcotic drug controlled substances, to wit: approximately 110.5 grams of cocaine hydrochloride, and approximately 106.97 grams of cocaine hydrochloride.

This is an appeal from a verdict of The District Court for the Southern District of New York, entered December 18, 1974, convicting the defendant-appellant of one count of unlawfully, intentionally and knowingly distributing and possessing with intent to distribute cocaine, a Schedule II narcotic drug controlled substance.

The defendant-appellant was sentenced before Judge Tyler on February 14, 1975, to a term of three years and six months, and pursuant to T.21, Section 841 United States Code, the defendant-appellant is to be placed on special parole for a period of four years to commence upon expiration of his sentence.

UNITED STATES COURT OF APPEALS
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FACTS

Government's Case

The Government's first witness was Marion Ladd. Ladd testified that in August of 1972 she was arrested for extortion. Prior to August, 1972, she had been arrested between 15 and 17 times and had spent approximately 17 years in jail. As a result of this August, 1972, arrest and because of charges that might be lodged against her son, she agreed to cooperate with officials of the Drug Enforcement Division of the New York State Joint Task Force (p. 28)*. In January, 1973, she met Dorothy Johnson, an undercover policewoman known as Mickey, and was

* Numbers in parenthesis refer to pages of trial transcript

instructed that she was now to arrange buys of cocaine or heroin with certain people (p. 31).

Sometime during April of 1974, Ladd was instructed by Johnson to arrange a buy of cocaine from the defendant, Norman Burton. Ladd arranged a meeting between Burton, Johnson and herself. At this meeting, in Burton's apartment, the subject of cocaine was discussed and Burton showed Ladd and Johnson a sample of cocaine which he cut one and one-half times. He said that any cocaine he sold would be able to stand this type of cut. Johnson stated that she wanted to purchase an eighth of a kilo and Burton stated that the price was between $3,800 and $4,200. This first meeting lasted approximately one hour and it was agreed that as soon as Burton was able to contact his supplier, he would notify Ladd who would in turn notify Johnson (pp. 39-41).

A second meeting was arranged by Ladd between Burton and Johnson but no sale was made at that time. Then one night during the Decoration Day weekend Burton telephoned Ladd and told her that he wanted to get in touch with Johnson because he had a package for her. Even though Ladd told Burton that she could not get in touch with Johnson, Burton told Ladd to come up

to his apartment to see the package. Ladd went to Burton's apartment and was shown the package and a sample from it. After this meeting Ladd had another meeting with Burton concerning certain money that was to be paid to Doris King for helping Burton to make a sale to Johnson. After this last meeting Ladd never saw Burton again until she testified at the trial. Ladd then testified that in July of 1974, she had been taken into protective custody because her life had been threatened (p. 52).

The next witness to testify was Dorothy Johnson, an undercover agent for the New York Drug Enforcement Task Force of the Organized Crime Patrol Bureau. She testified that she had first met Norman Burton in March of 1973 as a result of an ongoing narcotics investigation of Burton (p. 94). The next meeting occurred in April, 1974, when she was taken by Ladd to Burton's apartment to negotiate for a purchase of an eighth of a kilo of cocaine (p. 96). No sale of cocaine took place at this meeting but arrangements were made for Burton to contact Ladd as soon as he had some cocaine to sell to Johnson.

On May 8, 1974, Johnson and Ladd again returned to Burton's apartment. During this meeting an

individual known as Shepappy entered the apartment and had conversations with both Burton and Ladd. Again, no sale of cocaine was transacted at this meeting. Burton told Johnson that he would get in touch with her as soon as he had some cocaine to sell. A price of approximately $4,000 was agreed upon for an eighth of a kilo (pp. 100-2).

The next meeting Johnson had with Burton took place on May 28, 1974. During this meeting Johnson was wired and the conversation she had with Burton was recorded (p. 105). At this meeting Burton informed Johnson that he had some cocaine to sell her and it would cost $4,200. Burton made a telephone call and told Johnson that the cocaine was being brought to his apartment. Johnson, on the pretext of moving her car from a bus stop, left the apartment for a short while in order to inform her surveillance team of the imminent buy. When she again returned to the apartment there was another male there and Burton introduced this male to Johnson as Ron (pp. 113-115).

At this time Doris King called Burton on the telephone, and with Johnson listening with Burton's permission, and told Burton not to sell cocaine to Johnson. Because of Burton's nervousness he refused to

sell the cocaine to Johnson at this time (p. 117). The next day, May 29, 1974, Johnson telephoned Burton on two occasions and both of these telephone calls were recorded (p. 119). After these telephone calls Johnson went to Burton's apartment in order to make the buy.

Shortly after arriving at Burton's apartment Johnson heard over the intercom system that certain individuals were on their way up to Burton's apartment. Stating that she didn't want to be seen, Burton hid her in his bedroom just before two men and a woman entered the apartment. A general conversation concerning narcotics began and Johnson could hear money being counted. Approximately 15 minutes later the two men, the woman and Ron left the apartment (pp. 125-127).

Burton informed Johnson that Ron was to return with the package of cocaine. After 45 minutes Johnson left the apartment and returned approximately one and a half hours later. Ron had still not returned so Burton again put Johnson in his bedroom as there was another man in Burton's apartment. Shortly thereafter Ron returned and about 5 or 10 minutes later Burton came into the bedroom carrying a plate with cocaine on it. Burton demonstrated the quality of the cocaine with

the use of three strainers. It was at this time that Johnson gave $4,200 for the cocaine (pp. 131-2).

Johnson then left and joined her surveillance team at a prearranged location and the cocaine was field tested and positive results were obtained (p. 133).

On July 14, 1974, Johnson had a telephone conversation with Burton and Burton told her to come up to his apartment on July 15, 1974, at 2:00 p.m. Shortly after arriving at 2:00 p.m. Johnson was told to go and call up around 6:00 p.m. to see if Burton had more cocaine to sell to Johnson. Johnson came back for a second time that day and purchased an eighth of a kilo of cocaine from Burton for $4,200. Again the cocaine was field tested and positive results were obtained (pp. 141-2).

The next witnesses called were Jack Fusanello and Frederick Martorell, forensic chemists for the New York Regional Laboratory of the Drug Enforcement Administration. Both testified as to the chemical makeup of the two packages sold to Johnson and both confirmed that the substance was cocaine.

The next witnesses called were members of the New York City Police Department and the Department of Justice, Drug Enforcement Administration. They testified

as to observations made by them while on surveillance duty as well as to items seized in Burton's apartment pursuant to a search warrant.

Defendant's Case

The first witness called by the defense was Denise Heyward. Heyward testified that she lived with Burton from April, 1972, to January, 1973. Heyward testified that sometime during late September or early October, 1972, she had seen Policewoman Johnson in Burton's apartment.

The defendant, Norman Burton, testified in his own behalf. Burton testified that he was involved in real estate and owned a large apartment building located at 748 St. Marks Place, Brooklyn, New York (p. 342). He testified that he had first met Marion Ladd in 1971. On April 9, 1974, Burton loaned $200 to Ladd and took her television as collateral (p. 345). Approximately two days later Ladd came back up to Burton's apartment and was accompanied by Dorothy Johnson. At this meeting Ladd tried to sell some costume jewelry to Burton (p. 353). After general conversation both Johnson and Ladd left the apartment. Johnson came back to Burton's apartment the next day and told

Burton that she didn't want Ladd knowing that she had met Burton prior to the time Ladd introduced her to Burton (p. 354).

Burton testified that on no occasion did he ever sell narcotics to Johnson. He testified that on May 29, 1974, he was in Garden City, Long Island, at Sackman & Gilliland Corporation. He had gone to Sackman & Gilliland with a check in order to make a payment on his mortgage. He testified that he left New York for Garden City at somewhere between 1:00 and 2:00 p.m. and did not get back home until between 6:00 and 7:00 p.m. (pp. 355-7). Burton stated that on two occasions when Johnson was visiting him he had had relations with her and this is when he had taken off his hairpiece and she had seen a certain deformity on his head (p. 361).

Burton further testified that he suffered from an ulcer which required the use of lactose as a form of medication (p. 362).

Rebuttal

The Government called as a rebuttal witness one Edward Doyle, an employee of Sackman & Gilliland. Doyle testified that on either May 31, 1974 or June 3,

1974, he personally received from Burton the check that Burton said he delivered on May 29, 1974.

POINT I

THE USE OF THE ALIAS "BIG TIME" IN THE INDICTMENT AND DURING TRIAL CONSITITUTED REVERSIBLE ERROR

The defendant was indicted as Norman Burton, a/k/a "Big Time". During the trial the assistant United States Attorney constantly referred to the defendant not by his true name, but as "Big Time" (see pages 33, 34, 35, 41, 75, 94 and 136 as some, but not all, of the examples).

The practice of including aliases in indictments is strongly disapproved. Only when proof of an alias is relevant to identifying the defendant should a court allow its inclusion in the indictment and its subsequent introduction at trial. United States v. Wilkerson, 456 F.2d 57 (CCA 6, 1972), cert. denied Gray v. United States, 408 U.S. 926; United States v. Monroe, 164 F.2d 471 (CCA 2, 1948), cert. denied 333 U.S. 828.

The case at bar concerned a sale of narcotics to an undercover agent. The undercover agent, as well as all other witnesses who testified on behalf of the prosecution, knew the defendant as Norman Burton. There was absolutely no question of identification in

this case. It has been held that where there is no question as to identity, then it would be improper to indict a defendant under an alias. United States v. Grayson, 166 F. 2d 863 (CCA 2, 1948); United States v. Wilkerson, supra. In the Grayson case, the defendant was indicted under an alias by coupling with his name his former name, which had been legally changed.

In Petrilli v. United States, 129 F. 2d 101 (CCA 8, 1942), cert. denied, 317 U.S. 657, the Court stated at page 104:

> The preliminary reading of the aliases in an indictment is not a practice which should be encouraged in an ordinary criminal prosecution, but rather one which should be curbed. Where the trial court permits the indictment to be read to the jury, it can properly require that all reference to the aliases by omitted, until their relevance in the indictment and their competency on the trial have been properly developed in the proceedings. The accused on his part may seek to protect himself by such a direct request

to the court. But where, as here, a reference to the aliases has crept into the proceedings, the situation on appeal will not be controlled by the application of any abstract principle, but by a concrete appraisal of the significance of the indictment in relation to the processes of the trial as a whole.

In the instant matter the defendant was indicted as "Big Time". As there was no question of identification of the defendant, the reason the Government could have possibly had for using the alias was to show that he was a heavy dealer in narcotics. Had the defendant been nicknamed "Small Time" there is no doubt that he would never have been indicted under this alias. Furthermore, the only evidence heard during trial, and the only crimes for which the defendant was indicted, was the sale of an eighth of a kilo of cocaine on two separate occasions. This is hardly indicative of a "big time" dealer in narcotics.

In the case at bar, defense counsel failed to object to the use of the alias in the indictment. It was only during trial, that the defense counsel raised an objection to the use of the alias when the assistant

United States Attorney referred to the defendant as "Big Time" Norman Burton (p. 136). The court overruled the objection.

In the Petrilli case, where defense counsel raised absolutely no objection to the use of the aliases, the court stated at page 104:

> We do not, of course, mean to imply that the failure to make such a proper objection would necessarily preclude us from reviewing the incident as part of the trial process, or that appellant's view of it at the time should be accepted as controlling in our appraisal of whether it had operated to prevent him from having a fair trial.

It has been held that where paramount considerations are involved the failure of counsel to particularize an exception will not preclude the Court from correcting error. In criminal cases involving the life or liberty of the accused the appellate courts of the United States may notice and correct, in the interest of a just and fair enforcement of the laws, serious errors in the trial of the accused fatal to the

defendant's rights, although those errors were not challanged or reserved by the objections, motions, exceptions, or assignments of error. Read v. United States, 42 F. 2d 636 (CCA 8, 1930); Van Garder v. United States, 21 F. 2d 939 (CCA 8, 1927).

In the case at bar, the inclusion of the alias "Big Time" so prejudiced the defendant that the conviction must be reversed notwithstanding any other evidence there may have been against the defendant. Williams v. United States, 168 U.S. 382, 18 S.Ct. 92, 42 L.Ed. 509 (1897); Hall v. United States, 150 U.S. 76, 14 S.Ct. 22, 37 L.Ed. 1003 (1893).

POINT II

THE INTRODUCTION INTO EVIDENCE OF TESTIMONY NOT RELEVANT TO THE OFFENSE CHARGED CONSTITUTED REVERSIBLE ERROR.

A. Protective Custody

One of the major witnesses for the prosecution was Marion Ladd. Her basic testimony was that she had introduced the defendant to an undercover agent for the purpose of setting up a buy of cocaine by the agent from the defendant. The two buys which she helped to arrange took place on May 29, 1974 and July 15, 1974. During direct examination Ladd was asked whether there was a change in her situation as informer in July, 1974. The following answers were given:

A. Yes, there was.

Q. What happened?

A. I was taken into protective custody of the Government.

Q. Which Government is that?

A. U. S. Government.

Q. Why was that?

Mr. Bobick: Objection.

A. My life had been threatened.

The Court: Just a moment. I am going to sustain the objection. I don't thing we need to get into the details on that.

Q. As part of that program, the protective program, were you moved to a new location:

A. Yes. (pp. 52-53).

There is no question that where proffered evidence is of substantial probative value and will not tend to prejudice or to confuse, all doubt should be resolved in favor of admissibility. United States v. Allison, 474 F. 2d 286, vacated 490 F. 2d 79 (CCA 5, 1973). However, the admission of irrelevent facts that have a prejudicial tendency is fatal to a conviction, even though there was sufficient relevant evidence to sustain the verdict. Williams v. United States, 168 U.S. 382, 18 S.Ct. 92, 42 L.Ed. 509 (1897); Hall v. United States, 150 U.S. 76, 14 S.Ct. 22, 37 L.Ed. 1003 (1893).

The introduction into evidence of the fact that Ladd's life had been threatened could lead to no assumption other than that the defendant had threatened Ladd's life and this is why she was taken into protective custody. Furthermore, it is also impossible to tell

exactly how much this fact, elicited on direct testimony, played in the minds of the jury in reaching their verdict.

B. Prior Investigation

Another major witness for the prosecution was Dorothy Johnson, the undercover agent involved in this case. On direct examination Johnson testified that she had first met the defendant in March of 1973. The following questions were asked:

> Q. Without going into details, would you please explain to the jury the general circumstances of that first meeting:
>
> A. Well, I went to the apartment. It was on an investigation that the Task Force had on Norman Burton.
>
> Q. What sort of investigation was that?
>
> A. It was a narcotics investigation. (p. 94).

Defense counsel's motion for a mistrial was denied even though the court agreed that there were "no charges or an arrest or conviction or anything like that in 1973 . . ." and that the question "is susceptible of a number of interpretations, at least as far as I can tell." (p. 95).

The introduction into evidence of the above facts was highly prejudicial to the defendant. The jury

thus learned that the defendant was the subject of a narcotics investigation in 1973 even though the Government never indicted the defendant for any narcotics involvement in that year.

In order for evidence to be admissible in criminal trials it must be strictly relevant to the particular offense charged. Williams v. New York, 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949). In the instant matter the fact that the defendant was the subject of a narcotics investigation in 1973 was not relevant to the particular offense charged and was so highly prejudicial that it constituted reversible error.

C. Gourmet Cokebook

Pursuant to a search warrant certain evidence was seized at the defendant's apartment and subsequently introduced into evidence at trial. Among those items seized and introduced into evidence was a gourmet cokebook which can be legally purchased at various bookstores throughout New York City. On cross-examination the defendant was asked whether he had ever read this book and whether he was familiar with certain passages which were read in open court to him.

The introduction into evidence was highly

prejudicial in that it had no bearing on the charges involved in this case. Williams v. New York, supra; Williams v. United States, supra; Hall v. United States, supra. United States v. Dean, 435 F. 2d 1 (CCA 6, 1970).

POINT III

THE ASSISTANT UNITED STATES ATTORNEY'S COMMENTS ON SUMMATION CONCERNING DEFENDANT'S FAILURE TO CALL WITNESSES CONSTITUTED REVERSIBLE ERROR.

During summation the assistant United States Attorney made the following statements:

> Well, let's do the defense case very briefly. I want you to try and put yourselves in the position of the defendant in a criminal case, and you are wrongly accused. It is a drug charge and you know that you are innocent, you are wrongly accused.
>
> During the course of your testimony you say that on one occasion when you are charged with a sale you weren't present and you have a defense, such as the defense presented here, that indicates that you know the chief complaining witness, the chief Government witness, Detective Johnson, at a previous time, and you know that you met her with other people, and you know that if you can convince the jury that you met her in 1972 and that you had

some sort of involvement with her that is going to be a terrific point for your defense, because you know you are innocent.

So what do you do? You round them up, don't you? You round up people like - - (pp. 495-6).

The general rule permits comment on missing witnesses if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction. However, no presumption arises from the failure of the defendant to call a witness if the witness is equally available to the Government and is in a legal sense a stranger to the accused. Pennewell v. United States, 353 F. 2d 870 (1965); Graves v. United States, 150 U.S. 118, 14 S.Ct. 40, 37 L.Ed. 1021 (1893); Milton v. United States, 110 F.2d 556 (1940); Wynn v. United States, 397 F. 2d 621 (1967).

In the instant matter the prosecutor's statements inferred that an adverse inference could be drawn from the fact that the defendant failed to call any witnesses on his behalf concerning his defense. The defendant did take the stand and testified as to an alibi concerning the sale allegedly made on May 29, 1974. Nothing was said concerning the sale on July 15,

1974. The prosecutor's statements concerned the defendant's entire defense.

In United States v. Blakemore, 489 F. 2d 193 (CCA 6, 1973), the court held that the trial judge erred in allowing the prosecutor to comment in argument to the jury that defendant's failure to call four prospective witnesses gave rise to an inference that their testimony would be unfavorable to the defendant, where the court, despite defense objection, failed to first determine, in support of its ruling, that the witnesses were peculiarly within defendant's power to produce and that their testimony would elucidate the transaction.

In the case at bar the trial court erred in allowing the prosecutor to comment on missing witnesses without first determining whether these witnesses were peculiarly within the defendant's power to produce and if their testimony would elucidate the truth.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT APPEALED FROM MUST BE REVERSED.

Respectfully submitted,

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Rec. Brief & Appendix

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